Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-472

OTIS T. LEMM, a/k/a OTICE T. LEMM,
Petitioner,

v.

WASHINGTON SUBURBAN SANITARY COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

OTIS T. LEMM, a/k/a OTICE T. LEMM,
8301 MacArthur Blvd., Bethesda, Md.,

Petitioner,

v.

WASHINGTON SUBURBAN SANITARY COMMISSION,
4017 Hamilton St., Hyattsville, Md., 20781,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to
THE COURT OF SPECIAL APPEALS OF MARYLAND

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

OPINIONS OF COURTS BELOW

Hereto appended, marked Exhibit A, is a copy of the "UNREPORTED" (sic) opinion of the Court of Special

Appeals of Maryland, No. 1374. Also, appended, marked Exhibit B, is the judgment, entitled "Inquisition" of the trial court, the Circuit Court of Montgomery County, Maryland, Law No. 46,403 and some remarks of the trial judge indicating his views.

GROUNDS ON WHICH JURISDICTION IS INVOKED

Date of Judgment

The judgment in eminent domain, entitled Inquisition, was filed and entered November 25, 1977. The opinion of the Court of Special Appeals was filed and entered June 22, 1978.

Statute Believed to Confer Jurisdiction

The statutory provisions believed to confer jurisdiction on this Court are contained in the Judicial Code, Title 28, U.S. Code, Sections 2101(c) and 2104.

Question Presented

In Maryland eminent domain taking, where owner appears at trial held by a judge, without counsel and owner declines to take, and does not take, any part in the trial unless she can obtain Maryland counsel, and both the court rule and the statute require a view of the property by trier of fact before any testimony can be taken

(unless the parties agree in writing to proceed without such preview, and the owner specifically refuses so to

agree),

whereupon the Judge proceeds with trial, hears all evidence and testimony by plaintiff only, and only thereafter views the property and then forthwith enters judgment of condemnation and the price as proposed by the plaintiff, said judgment is affirmed by appellate court on Opinion that owner waived the required preview by failure to object, has the owner been denied her day in court and her property taken without due process and just compensation?

Constitutional Provisions, ETC., Involved

14th Amendment of U. S. Constitution. Power of eminent domain must be exercised with due process of law and on compensation being made: *Cincinnati v. Louisville & N.R. Co.*, 223 U.S. 390 (1912), 56 L.Ed. 481. It must be exercised for a public purpose: *Sweet v. Rechel,* 159 U.S. 380 (1895), 40 L.Ed. 188. The 14th Amendment operates to extend the same protection against arbitrary State action as the Fifth Amendment: *Hibben v. Smith,* 191 U.S. 310, 325 (1913), 48 L.Ed. 195.

Statement of the Case

Respondent (plaintiff below), a municipal corporation, filed a petition for condemnation in the Circuit Court for Montgomery County, Maryland, whereby it sought to acquire an easement and right of way over a scenic portion of defendant's (petitioner herein) country estate in order to run a sewer line over her property to replace a temporary sewer line then in place on, and for the sole benefit of, the adjacent developer's property to serve 24 houses already erected thereon by said developer, the taking area included a creek

bed with approximately fifteen additional feet in width for a distance of about 450 lineal feet, for practically the entire length of the Eastern line of her property.

Defendant owner filed her affidavit in support of her motion and her answer, that she had been involved in an automobile accident and unable to attend to business, that she found notice of trial and the petition some 18 days only before and within which she would have to procure Maryland counsel not already committed on other litigation and who would be able to prepare for trial including the necessary engineering topography work. Her motion was granted and the trial re-set to November 25, 1977. However it was impossible for her to procure uncommitted Maryland counsel who would be able to make the necessary preparation to prepare and be ready for trial by that date and therefore she moved for an additional postponement, which was denied, the Judge informing her that if she did not show up for the trial, "We would go ahead and try the case without her."

Said motion also moved to set aside a previous ex parte ruling by the Court that plaintiff had established the necessity for the proposed taking; for leave to oppose the claim of necessity; to Answer; and that all issues be tried by the Court without jury, all of which were granted. The Answer placed at issue every material allegation in the petition, with particular emphasis on the claim of necessity.

The trial took place November 25, 1977, the transcript of which consists of 47 pages.

The appellate court quotes only part of the proceedings but omits a material part bearing on the question which it phrases, viz., the necessity of a pre-view of the property by the trier of fact, here the Judge, before any testimony can be taken (Exhibit A hereto appended). It appears to recognize

that "Rule U18" is controlling, but says it need not reach the question whether the use of "shall" therein is mandatory, "because, under the facts and circumstances of this case, we conclude appellant waived this requirement by her own actions. First, she did not present herself to the court when the case was first called for trial and, more importantly, she made no objection to the court's ruling that it intended to view the property after taking the testimony." This waiver so-called is held in the face of the appellate court's "First" item, as to which it says, "When the case was called . . . appellant was not in attendance, apparently due to her appearance in the local Maryland District Court on a traffic matter. And as to the "more importantly" item of the appeals court, that she made no objection to the Judge's announced intention to take testimony first, then view the property, be it noted that its Opinion (Exhibit A) quotes the following:

"MR. DUNCAN (plaintiff's counsel): Mrs. Lemm this is a waiver of the requirement by the Court to go out, as the Court sitting as the trier of fact, waiver to require him to go out and look at the property.

"Do you want the Judge to go out and look at the property, or are you satisfied that the Judge hear the testimony from the witnesses and whatever testimony that you might care to present —

"MRS. LEMM: I would have to have an attorney to advise him. I am going to have an attorney, if possible.

"THE COURT: You don't want to sign that?

"We will go out and look at it."

* * * *

"THE COURT: All right. The Court has a little discretion here. The Court can waive, but, of course, *that waiver has to be agreed to by both sides. It has to be waived by all parties.* So, I guess since you won't waive, I will have to go look at the property. . ." (Underscoring added.)

Whereupon plaintiff proceeded to complete its testimony. (Tr. 24-43) And the following occurred:

"THE COURT: Mrs. Lemm, you have no case to put on, I guess.

"MRS. LEMM: No, I don't. I am not trying it."

She had from her first appearance in the courtroom repeatedly declined to take any part in the proceedings as she did not have a Maryland lawyer. "THE COURT: Excuse me I don't mind if you sit up there with her, if she wants to consult you once in awhile. *You won't be able to argue the case and make objections or anything like that.*" (Underscoring added.) "MRS. LEMM: I don't hear too well. . . .I want to hear the Judge."; "They are going to build things all the way around there for easements I will have to pay for. My attorney advised me that. *I don't see how I can try this case without an attorney.*" (Underscoring added.) THE COURT: Mrs. Lemm, you may ask this witness any questions that you want to ask him. . . . MRS. LEMM: I am not trying this case today, Judge, until I get an attorney. . . .". "THE COURT: Mrs. Lemm, I guess you have no questions? THE WITNESS (*sic*): You are handling the case. I have no attorney. THE COURT: Mrs. Lemm, you have no case to put on, I guess. MRS. LEMM: No, I don't. I am not trying it."

The Court then recessed, and returned in session at 2:15 p.m., when it noted that Mrs. Lemm was not present, and said, "I don't think it necessary to hear any argument", stated that it had viewed the property during the recess (Tr. 44), and that it would sign the "inquisition" (Tr. 45).

Argument

Argument falls into two principal points, viz., I. In Maryland Eminent Domain proceedings can the property owner be held (by the highest court in the State to which appeal in such cases can be taken) to have waived the statutory requirement that the property be viewed by the trier of fact before testimony be taken, by conduct specified by said court "under the facts and circumstances" as "first" she was not in court when the case was called for trial, and "more importantly" she voiced no objection when the court ruled that it intended to view the property after, not before, taking testimony.

Here we have two "facts and circumstances", namely, the owner was tardy and did not make an objection to a ruling of the court. The first will hardly bear so heavy a consequence. It calls perhaps for reprimand and a penalty as if for contempt. But, says the court, she did not object to said ruling. The Court had just discussed the rule, saying its discretion was limited to postponing the view of the property if both parties agreed in writing to waive the rule, asking the owner if she would so agree, finding that she would not. Throughout the proceedings the owner repeated constantly that she would not participate in the trial so-called, unless she had an attorney. How could she voice objection to the court's ruling without participating and raise technicalities she was not competent to argue? Hadn't the Judge just ruled that the requirement of preview could not be dispensed with unless both sides agreed to it, and do so in writing? So drastic a result as the one held to apply by the appellate court must depend on some sort of estoppel. But in what way did her not saying "I object", or something to that effect (and what she repeatedly did say was objection to the entire proceeding against her property, the so-called trial, when she refused to participate without counsel) hamper the plaintiff, or the trial,

from proceeding in accordance with law? If the Judge, in the face of his rulings and asking her to agree, felt he was justified in trying the cause ex parte, as upon default to defend, he (and the plaintiff's attorney) had only to proceed to trial in accordance with law. But what did they do? Plaintiff introduced testimony, and exhibits, without mention of any view vel non, the Court was equally silent until he acted sua sponte to call counsel's attention to the governing requirement Rule U18. Then after himself recognizing and stating the necessity of the preview, he lets the trial proceed with plaintiff putting in whatever it chose. Then, contrary to his ruling as to the law, the Judge viewed the property, dispensed with argument, and signed the inquisition or judgment as prepared by plaintiff.

If before any testimony had been taken, the court had found the owner in default, and correctly so, it might then have conducted a valid and legal trial. What it did rendered the "trial" a nullity, and any judgment based therein void. Nor can the plaintiff complain of this consequence, for it had its day in court and chose to abort it by its own free conduct.

It is elementary that rules of court are binding on court, counsel and contestants alike according to their terms. See cases cited in footnote*. But this Rule U18 is not merely an ordinary rule of court. It is validated by statute, viz., Maryland Code, Title 12, Section 12-101 (1957), Subtitle 1. General Rules, provides, "All proceedings for the acquisition of private property for public use by condemnation are governed by the provisions of this title and of Subtitle U of the Maryland Rules. . ."*

*Bergeman v. State Roads Commission, Md., 218 Md. 137, 146 A.2d at p. 51

"In Maryland a view is provided before the taking of testimony under Code (1957), Art. 33A, Sec. 7."

Quynn v. Brooke, Adm'r, (Carroll) 22 Md. 288.

Clarke v. Magruder, 2 Harr. & J. (Md.) 79.

Fullerton v. Bank, 1 Pet. (U.S.) 604, 7 L.Ed. 280

II. By her Answer and otherwise petitioner raised in the trial court the question of necessity of this taking. It is obvious that the ex parte valuation, adopted by the trial court, is unilateral and nominal, hence this would be a case of taking private property for an alleged public use without just compensation. Properly tried, with petitioner given her day in court, no such result appears possible.

Wherefore petitioner respectfully prays that this Court issue its writ of certiorari to the Court of Special Appeals of Maryland, and that in due course thereon the judgment ("inquisition") entered below be vacated and held for naught, and the Petition For Condemnation filed below be dismissed with prejudice.

EWING LAPORTE
1069 Nat. Press Bldg.
14th & F Streets, N.W.
Washington, D.C. 20045
DI-7-6631

Attorney for Petitioner

ENDORSEMENT OF SERVICE

I hereby certify that on September , 1978, I deposited in the United States Post Office, with first-class postage prepaid, three printed copies of this Petition and its appendix, addressed to Royal C. Duncan, Esq., counsel of record for respondent, Washington Suburban Sanitary Commission, at his office 4017 Hamilton Street, Hyattsville, Maryland, 20781, telephone #301-277-7700.

(Ewing Laporte)
Attorney for Petitioner

Exhibit A of Appendix

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

September Term, 1977

No. 1374

OTIS T. LEMM,
a/k/a OTICE T. LEMM

v.

WASHINGTON SUBURBAN SANITARY COMMISSION

Mason
Wilner
Couch,
JJ.

PER CURIAM

Filed: June 22, 1978

Appellant, Otis T. Lemm, also known as Otice T. Lemm, pro se, presents this appeal, in a condemnation case, feeling aggrieved by the action of the Circuit Court for Montgomery County in receiving evidence before viewing the involved property.

When the case was called for trial, trial by jury having been previously waived by the parties, appellant was not in attendance, apparently due to her appearance in the local Maryland District Court on a traffic matter. The record reveals that after some delay the court proceeded to receive some exhibits and that, at nearly noontime, appellant made an appearance, where upon the trial continued. While receiving the testimony of appellee's first witness, however, the court itself raised the issue of the "view" as required by Rule U18a of the Maryland Rules of Procedure. What took place in this regard is enlightening. The record shows:

> "THE COURT: Incidentally, before we proceed further, I don't think anybody wants to go out and walk around the property; do we? We don't want to view the property; do we?
>
> MR . DUNCAN: On behalf —
>
> THE COURT: Do you plan on the view?
>
> MR. DUNCAN; On behalf of the Commission, I am prepared to waive the requirements.
>
> THE COURT: Here is a written waiver. That is what the rule requires.
>
> MR. DUNCAN: Mrs. Lemm, this is a waiver of the requirement by the Court to go out, as the Court sitting as the trier of fact, waiver to require him to go out and look at the property.
>
> Do you want the Judge to go out and look at the property, or are you satisfied that the Judge hear the

testimony from the witnesses and whatever testimony that you might care to present —

MRS. LEMM: I would have to have an attorney to advise him. I am going to have an attorney, if possible.

THE COURT: You don't want to sign that?

We will go out and look at it.

MRS. LEMM: I know all about it now. I have been very, very well informed.

THE COURT: Thank you. We will go out and look at it then.

MR. DUNCAN: I don't know what the Court's schedule is. I was hoping we could proceed with the testimony from the witnesses and then the Court—

THE COURT: It is usually done the other way around. It provides before any further proceedings. I believe the rule says before any further—

MR. DUNCAN: It says before any testimony, the trier of the fact will view the property.

THE COURT: Before the production of other evidence.

How far away is this property? Where is it?

MR. DUNCAN: On MacArthur Boulevard. I believe it is about a half hour drive from here.

THE WITNESS: MacArthur and Persimmon Tree Road.

THE COURT: It says before the production of other evidence.

MR. DUNCAN: I know customarily. It has been done, in the Court's discretion, it has done it otherwise frequently when the jury is called in, the property might be very remote, muddy, what have you. Then, they take testimony until the jury can come in the following day.

THE COURT: Have you known it to be done otherwise?

All right. The Court has a little discretion here. The Court can waive, but, of course, that waiver has to be agreed to by both sides. It has to be waived by all parties. So, I guess since you won't waive, I will have to go look at the property. We will do that after we take the testimony.

MR. DUNCAN: I would think it would be best. That way Mrs. Lemm would only have to make one trip."

Mrs. Lemm argues that Rule U18 is a mandatory rule, leaving no discretion in the court to view the property after the reception of evidence rather than before. This Rule provides in part:

> "Before the production of other evidence, the Court shall direct one of its officers to take the jury to view the property sought to be condemned, or if the case is tried before the Court without a jury, the judge hearing the case shall view the property."

We need not reach the question whether the use of "shall", in rule U18, makes the view before the production of other evidence mandatory or directory because, under the facts and circumstances of this case, we conclude appellant waived this requirement by her own actions. First, she did not present herself to the court when the case was first called for trial and, more importantly, she made no objection to the court's ruling that it intended to view the property after taking the testimony. *See Bosley v. Grand Lodge*, 263 Md. 303, 283 A.2d 587, *cert. denied*, 93 S. Ct. 45 (1971), rules 1085 and 522b. We hold that appellant waived any right in regard to the timing of the view, under the circumstances.

Other questions presented in appellant's brief were not argued therein or at oral argument, and are deemed abandoned.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY
APPELLANT.

Exhibit "B-1"
Inquisition (Judgment)

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, MARYLAND

WASHINGTON SUBURBAN SANITARY COMMISSION, A Municipal Corporation	:	
Plaintiff,	:	**Law No. 46,403**
vs.	:	
OTIS T. LEMM (A/K/A OTICE T. LEMM)	:	
Defendant.	:	

INQUISITION

THIS INQUISITION, made and taken in the Circuit Court for Montgomery County, upon submission by the parties to said action of all issues herein for the determination thereof without a jury and to ascertain and determine whether or not it will be necessary for the Plaintiff to acquire the land and property hereinafter described and as set forth in the Petition for Condemnation, and to inquire into, ascertain and justly and impartially value the fair market value which said Defendant will sustain by the taking of the said easement and right of way in the property for the installation, construction, reconstruction, maintenance, repair, operation and inspection of a sanitary sewer and appurtenances thereto within said easement and right of way, for any and all of such

purposes, as described in the Petition filed herein against said Defendant and more particularly set forth as follows:

Being a strip or parcel of land fifteen (15) feet wide, seven and one-half (7½) feet on each side of the centerline, in, through, over and across the property of the defendant hereto obtained from Jeanne Benedict by deed dated June 3, 1941 and recorded among the Land Records of Montgomery County, Maryland in Liber 835 at Folio 296.

Beginning for the said centerline of the said fifteen (15) feet wide strip or parcel of land at a point on the 6th or North 35°55' West 239.3 foot line, as described in the aforesaid deed; said line being also a southwesterly or North 36°22'20" West 239.18 foot line of Parcel "A", as shown on a plat of subdivision entitled "Part of Block F, Congressional Country Club Estates" and recorded among the aforesaid Land Records in Plat Book 98 as Plat No. 10940, 63.28 feet from the end thereof; running thence through the property of the first party hereto: 1) North 48°36'30" West, true, 115.15 feet to a point; thence 2) North 30°08'00" West, true, 201.19 feet to a point; thence 3) North 45°13'36" West, true, 86.11 feet to a point on the 8th or North 56°18' West, 226.9 foot line, as described in the aforesaid deed; said line being also the North 56°45'20" West 226.78 foot line of the aforesaid Parcel "A", 84.95 feet from the beginning thereof; containing 6,037 square feet or 0.1386 acre. (Said easement and right of way is shown in green on the plat filed herewith as part hereof, marked "Petitioner's Exhibit 'A' ".)

And further, the right to use two (2) additional strips or parcels of land the first being fifteen (15) feet wide lying southwest of and adjacent, contiguous and parallel to the above described strip or parcel of land, the second being five (5) feet wide lying northeast of and adjacent, contiguous and

parallel to the above described strip or parcel of land, during the period of the original construction only of the said sewer within the above described easement and right of way for any and all purposes pertinent thereto, including the right to trim or cut down trees during the course of the original construction. (Said additional strips are shown in orange on "Petitioner's Exhibit 'A' ")

The view of the property having been waived, pursuant to Rule U18d and e, by all parties, and after having heard the evidence and duly considered same, I do find and determine that:

It is necessary for the Plaintiff to acquire said property and that the just compensation and fair market value for the taking of the said easement and right of way hereinbefore particularly described and as set forth in the Petition for Condemnation, is in the sum of Two thousand fifty Dollars ($2,050.00) to the said Defendant, as her respective interests may appear.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal on this Inquisition this 25th day of November, 1977.

/s/ Joseph M. Mathias
Judge, Circuit Court for
Montgomery County, Maryland

EXHIBIT "B" continued by quoting from the transcript of the "trial" after the trial court had permitted the introduction of considerable evidence, including exhibits:

THE COURT: Incidentally, before we proceed further, I don't think anybody wants to go out and walk around the property; do we? We don't want to view the

property; do we?

MR. DUNCAN (Attorney for Plaintiff): On behalf —

THE COURT: Do you plan on the view?

MR. DUNCAN: On behalf of the Commission, I am prepared to waive the requirements.

THE COURT: Here is a written waiver. That is what the rule requires.

MR. DUNCAN: Mrs. Lemm, this is a waiver of the requirement by the Court to go out, as the court sitting as the trier of fact, waiver to require him to go out and look at the property. Do you want the Judge to go out and look at the property, or are you satisfied that the Judge hear the testimony from the witnesses and whatever testimony that you might care to present—

MRS. LEMM: I would have to have an attorney to advise him. I am going to have an attorney, if possible.

THE COURT: You don't want to sign that?

We will go out and look at it.

.. .. ..

MR. DUNCAN: That would be the Petitioner's case.

THE COURT: Mrs. Lemm, you have no case to put on, I guess.

Mrs. LEMM: No, I don't. I am not trying it.

THE COURT: I think what we will do is to take an hour for lunch, and then I will come on down there and take a look at the property. . . .

MR. DUNCAN: I hand you the Inquisition,. . . .

THE COURT: I think we better go down there now. . . .

(The Court is back in session at 2:15)

THE COURT: I don't think it is necessary to hear any argument. The Court, as the trier of fact, is entitled

to consider not only the evidence which we have heard in Court, but also take into consideration the view of the property. When we viewed the property, we noticed, we observed that the right-of-way which is to be acquired here is located in a deep gully. Mrs. Lemm's house is on the top of a very steep hill. It looked to me the decline was more then one foot drop at every two feet. I think in parts of it, it was more than that. It seems to me I tilted my head about sixty or sixty-five degrees in order to see her house on the top of the hill. Between the proposed easement area and Mrs. Lemm's house is, I would say, more than one hundred fifty feet. It is up a steep incline, and the whole incline is heavily wooded. There are literally hundreds of tall, large trees covering that hillside between Mrs. Lemm's house and the bottom of the hill where the creek is and where the easement will be located. I think it has been adequately shown by the evidence that there is, by the uncontradicted evidence, a necessity for this taking, and it would appear to the Court that there is actually no detriment to the value of Mrs. Lemm's property by reason of this proposed easement area. I don't think it could adversely affect the property at all. I think the Sanitary Commission's offer to pay her a total of two thousand fifty dollars is more than fair and reasonable. The Court finds that there is a necessity for the acquisition of this easement area, both permanent and temporary easement area and that the payment offered to Mrs. Lemm, the property owner and the defendant in this case, of two thousand fifty dollars is fair and just compensation. Therefore, the Court will sign the inquisition.